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No. 87-

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1987

RICHARD GERALD JORDAN,  
*Petitioner,*

v.

STATE OF MISSISSIPPI,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MISSISSIPPI**

JOSEPH P. HUDSON  
LAWYER AND HUDSON  
Post Office Box 908  
Gulfport, MS 39501

EARL B. STEGALL  
Post Office Box 1542  
Gulfport, MS 39501

TIMOTHY N. BLACK \*  
PHILIP D. ANKER  
MAXWELL O. CHIBUNDU  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

*Counsel for Petitioner*

May 2, 1988

\* Counsel of Record



## QUESTIONS PRESENTED

The Supreme Court of Mississippi below denied a petition for post-conviction relief in a capital murder case on the sole ground that the Sixth Amendment claim raised in the petition had been previously addressed in earlier proceedings. In conflict with its practice in other cases, and without regard for the standards for retroactivity, the state court refused to consider an intervening decision by this Court that established that the prior dispositions of the claim were wrong as a matter of federal constitutional law. The questions presented are:

1. Whether, in addressing a post-conviction petition that raises a federal constitutional claim, a state court may decline to consider an intervening relevant decision of this Court solely on the ground that the claim was previously rejected before the intervening decision was announced?

2. If a state court can under some circumstances refuse to consider an intervening decision of this Court on the basis of state-law principles of *res judicata*, may it do so if it has in other similar post-conviction cases ignored those principles and reexamined federal claims in light of intervening decisions of this Court?





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STATE OF MISSISSIPPI,  
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**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF MISSISSIPPI**

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Richard Gerald Jordan petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi denying him post-conviction relief with respect to his conviction for capital murder.

**OPINION BELOW**

The opinion of the Supreme Court of Mississippi denying Mr. Jordan's application for post-conviction relief is reported at 518 So. 2d 1186 and is reprinted at App. 1a-8a.

**JURISDICTION**

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982). On September 23, 1987, the Supreme Court of Mississippi entered judgment denying Mr. Jordan's application for post-conviction relief. App. 7a-8a. On February 10, 1988, the Supreme Court of

Mississippi without opinion denied Mr. Jordan's timely motion for rehearing. App. 9a. On April 4, 1988, Justice White entered an order extending the time for Mr. Jordan to file for certiorari through Sunday, May 1, 1988.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution of the United States:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 99-39-21(3) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-21(3) (Cum. Supp. 1987) :

§ 99-39-21. Procedural waiver of objections, defenses, claims; collateral estoppel; res judicata; burden of proof.

\* \* \* \*

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

Section 99-39-23(6) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-23(6) (Cum. Supp. 1987) :

§ 99-39-23 Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof.

\* \* \* \*

(6) . . . [A]ny order dismissing the prisoner's motion or otherwise denying relief under this chapter

is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter. . . . [E]xcepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . . .

Section 99-39-27(9) of the Mississippi Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987):

§ 99-39-27. Application to supreme court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.

\* \* \* \*

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this chapter. . . . [E]xcepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction . . . .

#### STATEMENT OF THE CASE

Richard Gerald Jordan is an inmate in state prison in Mississippi. This Petition arises from his conviction for capital murder and the subsequent denial by the Supreme Court of Mississippi of his application for post-conviction relief. As discussed below, Mr. Jordan's capital sentence was recently vacated. The State has indicated, however, that it intends again to seek the death penalty following resolution of this Petition.<sup>1</sup>

<sup>1</sup> The vacating of Mr. Jordan's death sentence does not alter this Court's jurisdiction to review the judgment of the Supreme Court of Mississippi denying Mr. Jordan's application for post-conviction

On January 13, 1976, Mr. Jordan was arrested and charged with the murder of Edwina Marter. Mr. Jordan was advised of his *Miranda* rights and questioned by agents of the Federal Bureau of Investigation.<sup>2</sup>

Later that same day, Mr. Jordan was brought before a county judge for arraignment and preliminary hearing. Mr. Jordan was not represented by counsel at the hearing. The judge informed Mr. Jordan of his right to counsel and asked him if he desired to have counsel appointed. In the presence of the District Attorney, the Sheriff, and the Deputy Sheriff, Mr. Jordan requested that counsel be appointed and "expressed a desire to delay any proceedings until counsel was appointed." *Jordan v. State*, 365 So. 2d 1198, 1201 (Miss. 1978), cert. denied, 444 U.S. 885 (1979). The judge immediately appointed counsel, instructed the Sheriff and the Deputy

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relief. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). Like Brady, Mr. Jordan can only obtain a sentence of life imprisonment or death at a future sentencing hearing; the result of that hearing cannot alter or moot his conviction for capital murder. Under Mississippi law, the denial of Mr. Jordan's application for post-conviction relief is a "final judgment" that will bar further efforts by Mr. Jordan in state proceedings to overturn his conviction. See Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987); see also App. 10a (mandate announcing "final judgment"). The decision below thus amounts to a final resolution by the highest state court in Mississippi of Mr. Jordan's constitutional challenge to his conviction and therefore may be reviewed by this Court. See *Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981); *Harris v. Washington*, 404 U.S. 55, 56 (1971). Moreover, Mr. Jordan's application for post-conviction relief was an independent proceeding from the direct appeal of the sentence. Final judgments of state courts disposing of such independent proceedings are reviewable by this Court. See, e.g., *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70-71 (1928).

<sup>2</sup> Mr. Jordan spoke with the federal agents outside the presence of counsel, but at the end of the interrogation refused to sign a written statement. Tr. 389. (References to "Tr." are to the transcript in *State of Mississippi v. Richard Gerald Jordan*, No. 7858 (Circuit Court, Jackson County, Mississippi)).



Sheriff to let Mr. Jordan confer with his appointed counsel, and postponed the taking of a plea.<sup>3</sup>

Less than forty-five minutes later—and before Mr. Jordan had an opportunity to meet or communicate with his court-appointed attorney—an investigator with the Sheriff's Department approached Mr. Jordan in the county jail and, after providing *Miranda* warnings, began to question him. The interrogation took place at the initiative and suggestion of the officer. It was conducted outside the presence of and without notice to Mr. Jordan's counsel. Inculpatory statements made by Mr. Jordan during the course of this interrogation were tape-recorded.<sup>4</sup>

In July 1976 the State of Mississippi prosecuted Mr. Jordan for capital murder. The trial court denied Mr. Jordan's motion to suppress the tape-recorded statements and permitted the State to play the tape-recording to the jury. The jury returned a guilty verdict and a sentence of death automatically followed under the Mississippi statute then in effect. The trial court, however, granted Mr. Jordan a new trial after the Supreme Court of Mississippi, to avoid constitutional problems, interpreted the statute not to provide for a mandatory death penalty.<sup>5</sup>

In February 1978 the State again prosecuted Mr. Jordan for capital murder. Mr. Jordan did not testify, but his tape-recorded statements were once more played to

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<sup>3</sup> Tr. 2513, 2515; Motion to Vacate and Set Aside Conviction, Jordan Aff., Exh. A (copy of transcript of January 13, 1976, proceeding) (motion filed April 13, 1987). See also *Jordan v. Watkins*, 681 F.2d 1067, 1071-72 (5th Cir. 1982).

<sup>4</sup> Tr. 1747-48, 437-41. See also *Jordan v. Watkins*, 681 F.2d at 1072.

<sup>5</sup> See *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976).

the jury during the guilt phase of the trial over the objection of defense counsel.<sup>6</sup> In closing argument at both the guilt and sentencing phases of the trial, the prosecutor relied extensively on Mr. Jordan's tape-recorded statements.<sup>7</sup> The jury returned a guilty verdict and death sentence.

On appeal, Mr. Jordan again argued (among other things) that the admission of the tape-recorded statements violated his constitutional right to counsel. Rejecting this argument, the Supreme Court of Mississippi held that Mr. Jordan had made a knowing and intelligent waiver of that right when he responded to police questioning after receiving *Miranda* warnings. *Jordan v. State*, 365 So. 2d at 1203. The state court affirmed the conviction and capital sentence.

Mr. Jordan sought certiorari, citing his Sixth Amendment claim as a reason for the Court to grant the writ.<sup>8</sup> This Court denied certiorari. *Jordan v. Mississippi*, 444 U.S. 885 (1979).

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<sup>6</sup> Tr. 2499, 2525, 2528; *see also* Tr. 1988-89.

<sup>7</sup> Tr. 2649, 2667-68, 2803. The prosecutor focused especially on Mr. Jordan's description of himself in his tape-recorded statements as a "marksman" in an effort to show that the killing had been intentional and not, as the defense claimed, the result of an accidental shooting. Tr. 2667-68, 2803. Mr. Jordan had made no comparable assertion in his earlier statements to the FBI agents. Those statements had not been tape-recorded and were presented by the prosecution to the jury only through the testimony of one of the agents. *See supra* note 2.

<sup>8</sup> In the petition for certiorari, the first question presented was: "Whether a custodial interrogation by law enforcement officers after petitioner had been presented in court for arraignment and counsel appointed, without notice to counsel, violates petitioner's right to counsel under the Sixth and Fourteenth Amendments?". Petition for Writ of Certiorari, at 2, *Jordan v. Mississippi*, No. 78-6577 (April 24, 1979).

Mr. Jordan subsequently commenced a habeas corpus proceeding in federal district court.<sup>9</sup> Again, Mr. Jordan contended that the admission of his tape-recorded statements violated his right to counsel under the Sixth Amendment. Both the district court and, on appeal, the Fifth Circuit rejected Mr. Jordan's challenge to the admission of the tape-recorded statements and denied the writ with respect to the conviction. Like the Supreme Court of Mississippi, the district court and the Fifth Circuit concluded that Mr. Jordan had made a knowing and intelligent waiver of his right to counsel.<sup>10</sup> The Fifth Circuit, however, vacated Mr. Jordan's death sentence, finding that the jury at the penalty phase had not been properly instructed in accord with this Court's decision in *Godfrey v. Georgia*, 446 U.S. 420 (1980). Neither the State nor Mr. Jordan sought certiorari from that decision.

Another sentencing proceeding ensued. The trial court excluded substantial mitigating evidence and again over the objections of defense counsel allowed the State to play the tape-recorded statements to the jury. On April 29, 1983, the jury returned a death sentence. On appeal, a sharply divided Supreme Court of Mississippi affirmed the death sentence. *Jordan v. State*, 464 So. 2d 475 (Miss. 1985).<sup>11</sup> On May 13, 1985, Mr. Jordan filed a

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<sup>9</sup> Mr. Jordan also unsuccessfully sought state post-conviction relief. See *In re Jordan*, 390 So. 2d 584 (Miss. 1980).

<sup>10</sup> See *Jordan v. Watkins*, 681 F.2d at 1070-75.

<sup>11</sup> Four of the nine justices dissented, concluding that the trial court had impermissibly restricted Mr. Jordan's presentation of relevant mitigating evidence. Without reconsidering the merits of the issue, the state court unanimously rejected Mr. Jordan's challenge on appeal to the admission of the tape-recorded statements at the sentencing proceeding, holding that the issue was "*res judicata*." *Jordan v. State*, 464 So. 2d at 480. In support of this holding, the court cited its earlier decision on direct appeal from the 1978 conviction and the Fifth Circuit's decision in the federal habeas corpus proceeding. *Id.*

petition for certiorari requesting review of the judgment of the Supreme Court of Mississippi.<sup>12</sup>

While the petition for certiorari was pending, this Court decided *Michigan v. Jackson*, 475 U.S. 625 (1986). The facts in *Jackson* were remarkably similar to those in the present case. After their arrests, the defendants in *Jackson* received several sets of *Miranda* warnings and made statements to the police. Both defendants were then brought for arraignment. During the course of their arraignments, they requested the appointment of counsel. Thereafter, they were approached by police officers who, after again advising the defendants of their *Miranda* rights, questioned them outside the presence of counsel.

Unlike the Supreme Court of Mississippi and the Fifth Circuit in the present case, this Court in *Jackson* held that the post-arraignment statements were obtained in violation of the defendants' Sixth Amendment rights. Citing Sixth Amendment decisions dating back to 1938,<sup>13</sup>

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<sup>12</sup> In his direct appeal to the Supreme Court of Mississippi from the 1983 sentencing determination, Mr. Jordan had raised eleven separate grounds for reversal, including the admission of his tape-recorded statements. See *Jordan v. State*, 464 So. 2d at 477. Because of space limitations, Mr. Jordan raised only three of these issues as reasons for grant of the writ in his subsequent 1985 petition to this Court for certiorari. Among the eight issues Mr. Jordan did not raise in the 1985 petition for certiorari was the admission at the sentencing proceeding of the tape-recorded statements. Because the sentence was subsequently vacated and Mr. Jordan is now entitled to a new sentencing hearing, the admission of the tape-recorded statements at the 1983 sentencing proceeding is not before the Court in connection with the present petition for certiorari.

<sup>13</sup> See *Michigan v. Jackson*, 475 U.S. at 633 ("Almost a half century ago, in *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case involving an alleged waiver of a defendant's Sixth Amendment right to counsel, the Court explained that we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights'"); see also *Michigan v. Jackson*, 475 U.S. at 635 ("In *Brewer v. Williams*, 430 U.S. 387 (1977), . . . the Court held that a valid waiver of counsel rights should not be inferred from

this Court rejected the contention that the defendants had waived their right to counsel when they responded to police-initiated interrogation. *Michigan v. Jackson*, 475 U.S. at 635.

On April 29, 1986, this Court issued another decision bearing on Mr. Jordan's then-outstanding death sentence. In *Skipper v. South Carolina*, 476 U.S. 1 (1986), the Court reaffirmed that a defendant in a capital sentencing proceeding must be allowed wide latitude to introduce evidence in mitigation. Shortly thereafter, the Court granted Mr. Jordan's then-pending petition for certiorari, vacated his sentence, and remanded the case to the Supreme Court of Mississippi for reconsideration in light of *Skipper*. *Jordan v. Mississippi*, 476 U.S. 1101 (1986).

Following the remand, Mr. Jordan sought and was granted leave to brief the effect of both *Skipper* and *Jackson* on the pending death sentence. Based on *Jackson*, Mr. Jordan also filed a timely petition for leave to commence a collateral challenge to his conviction under the Mississippi Uniform Post-Conviction Collateral Relief Act ("Mississippi Collateral Relief Act").<sup>14</sup> Mr. Jordan argued that the admission of the tape-recorded statements at the 1978 trial (which resulted in his conviction) and the 1983 sentencing proceeding (which resulted

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the mere response by the accused to overt or more subtle forms of interrogation or other efforts to elicit incriminating information") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484 n.8 (1981)).

<sup>14</sup> Under the Mississippi Collateral Relief Act, an inmate whose conviction has been affirmed on direct appeal must, in the first instance, file his application for post-conviction relief in the Supreme Court of Mississippi and obtain an order permitting him to proceed with the petition in the trial court. Miss. Code Ann. § 99-39-7 (Cum. Supp. 1987). Accordingly, Mr. Jordan filed his application in the Supreme Court of Mississippi on April 13, 1987.

in his then-death sentence) violated his Sixth Amendment rights and that the contrary decisions by the Supreme Court of Mississippi and the Fifth Circuit could not be reconciled with this Court's holding in *Jackson*.<sup>15</sup>

On September 23, 1987, the Supreme Court of Mississippi vacated Mr. Jordan's death sentence on *Skipper* grounds.<sup>16</sup> The state court, however, denied Mr. Jordan's application based on *Jackson* for collateral relief from the conviction. Citing its previous opinions and that of the Fifth Circuit, the Supreme Court of Mississippi summarily held that "the question is *res judicata* and is barred from relitigation."<sup>17</sup> In so ruling, the state court did not suggest that, on the merits, *Jackson* could be distinguished or that the state court's previous rejection of Mr. Jordan's challenge to the admission of the tape-recorded statements could still be substantively justified.

Mr. Jordan filed a timely motion for reconsideration of that portion of the September 23, 1987, decision that denied him post-conviction relief. In the motion and supporting briefs, Mr. Jordan argued that the state court's refusal to reconsider the Sixth Amendment issue in light of *Jackson* was contrary to this Court's jurisprudence on retroactive application of decisions of constitutional law, was inconsistent with prior holdings of the Supreme Court of Mississippi and the terms of the Mississippi Col-

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<sup>15</sup> With respect to his conviction, Mr. Jordan argued that *Jackson* applied retroactively to collateral proceedings and that, under both federal and state law, the prior resolutions of Mr. Jordan's Sixth Amendment claim could not be given preclusive effect because of the intervening *Jackson* decision. See Motion to Vacate and Set Aside Conviction, at 8-11, 14-21 (April 13, 1987); Brief in Support of Application for Leave to File Motion to Vacate and Set Aside Conviction, at 5-8 (April 13, 1987).

<sup>16</sup> App. 1a-6a. The court did not address Mr. Jordan's *Jackson* argument with respect to the sentence.

<sup>17</sup> App. 8a.



lateral Relief Act, and accordingly was incompatible with the dictates of due process and equal protection.<sup>18</sup>

While the motion for reconsideration was pending, this Court decided *Yates v. Aiken*, 108 S. Ct. 534 (1988). In a unanimous opinion, this Court reiterated that state courts in post-conviction proceedings are bound by intervening Supreme Court decisions on issues of constitutional law that apply established legal principles to new fact situations, even when those decisions are rendered after the conviction became final. Mr. Jordan promptly brought the *Yates* decision to the attention of the Supreme Court of Mississippi,<sup>19</sup> noting that the State had acknowledged that *Jackson* "is not new law."<sup>20</sup>

Nevertheless, on February 10, 1988, the Supreme Court of Mississippi denied rehearing without opinion.

### REASONS FOR GRANTING THE WRIT

This case raises important questions about the authority of state courts to refuse, on the basis of state rules of *res judicata*, to honor intervening decisions of federal constitutional law issued by this Court. Without addressing the merits of Mr. Jordan's *Jackson* claim—and without any regard for the standards developed by this Court for retroactive application of decisions of federal constitutional law—the Supreme Court of Mississippi denied Mr. Jordan's application for post-conviction relief on the

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<sup>18</sup> See Petition for Partial Rehearing and Brief in Support of Petition for Partial Rehearing (Oct. 8, 1987); Petitioner's Reply to State's Response to Petition for Partial Rehearing (Dec. 28, 1987).

<sup>19</sup> See Letter Brief from Philip D. Anker, Counsel to Mr. Jordan, to Sue Gordon, Clerk, Supreme Court of Mississippi (Jan. 15, 1988).

<sup>20</sup> Response to Motion to Vacate and Set Aside Conviction, at 4 (June 15, 1987); Response [to] Petition for Partial Rehearing, at 7 (Dec. 14, 1987).

sole ground that the earlier judicial determinations that Mr. Jordan had made a knowing and intelligent waiver of his Sixth Amendment right to counsel foreclosed further consideration of the claim.

The state court's *res judicata* holding means that Mr. Jordan stands convicted of capital murder and faces the possibility of a death sentence on the basis of tape-recorded statements taken from him in violation of his Sixth Amendment right to counsel. As we show below, the refusal by the Supreme Court of Mississippi to re-examine the earlier decisions—decisions that, in light of *Jackson*, are plainly erroneous<sup>21</sup>—is contrary to this Court's precedents as well as previous decisions of the Supreme Court of Mississippi and the Mississippi Collateral Relief Act. If allowed to stand, the decision be-

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<sup>21</sup> This Court in *Jackson* rejected precisely the same arguments that the Supreme Court of Mississippi on direct appeal and the Fifth Circuit in the federal habeas corpus proceeding accepted in concluding that Mr. Jordan had knowingly and intelligently waived his Sixth Amendment right to counsel. The Supreme Court of Mississippi emphasized that Mr. Jordan had received several sets of *Miranda* warnings and had already given a statement outside the presence of counsel before he requested the appointment of a lawyer and was subjected to a second interrogation. *Jordan v. State*, 365 So. 2d at 1202-03. The defendants in *Jackson* had likewise received several sets of *Miranda* warnings and had given statements before they invoked their right to counsel and were subjected to further questioning. See *Michigan v. Jackson*, 475 U.S. at 627 & n.1, 628. The Fifth Circuit emphasized that Mr. Jordan had requested counsel during an arraignment and construed the request only to encompass legal representation for purposes of judicial proceedings. *Jordan v. Watkins*, 681 F.2d at 1073-74. The defendants in *Jackson* had also made their requests for counsel at arraignments, and this Court specifically "rejecte[d] the State's suggestion that [defendants'] requests for counsel should be construed to apply only to representation in formal legal proceedings." *Michigan v. Jackson*, 475 U.S. at 633. See *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 123-24 n.5 (7th Cir.) (recognizing that the Fifth Circuit's *Jordan* decision may not be good law and declining to follow it in light of this Court's *Jackson* decision), cert. denied, 107 S. Ct. 3240 (1987).



low could have far-reaching implications, permitting state courts in a wide variety of criminal cases in which there have been intervening decisions to invoke *res judicata* and thereby ignore this Court's holdings on retroactivity, including that this term in *Yates v. Aiken*, 108 S. Ct. 534 (1988).

**I. The Decision Below Raises Important Questions About the Authority of State Courts in Post-Conviction Proceedings To Refuse To Apply Intervening Decisions of This Court Without Regard for Their Retroactivity.**

The decision below rests on the remarkable holding that the prior resolutions of Mr. Jordan's Sixth Amendment claim—both of which arose before *Michigan v. Jackson*—were *res judicata* and barred further consideration of the claim in light of *Jackson*.<sup>22</sup> That holding ignores the tests developed by this Court for retroactive application of decisions of constitutional law. Under those standards, *Jackson* must be applied retroactively, and the Supreme Court of Mississippi cannot decline even to consider the question.

The decision below is contrary to this Court's unanimous decision this term in *Yates v. Aiken*, 108 S. Ct. 534 (1988). In *Yates*, the Court held that intervening decisions of this Court that give effect to established principles of law in new and different factual situations

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<sup>22</sup> The court below noted that Mr. Jordan (like the State) had not sought certiorari from the Fifth Circuit's decision which denied him habeas corpus relief with respect to his conviction, but which vacated his then-pending death sentence. As discussed above, however, Mr. Jordan had previously raised his Sixth Amendment claim in his unsuccessful 1979 petition for certiorari from the judgment of the Supreme Court of Mississippi affirming his conviction. Cf. *Fay v. Noia*, 372 U.S. 391, 435-36 (1963) (holding that a defendant's failure to seek certiorari from a judgment with respect to a state criminal conviction will not generally preclude the defendant from bringing a subsequent collateral challenge in federal court to the conviction).

must be applied retroactively even in state collateral proceedings. *Jackson*, like *Francis v. Franklin*, 471 U.S. 307 (1985), the case at issue in *Yates*, is a decision that should be applied retroactively in collateral proceedings. As this Court emphasized, the holding in *Jackson* that an accused who requests an attorney at arraignment does not waive his right to counsel merely by later responding to police-initiated interrogation was an application of a well-established line of cases narrowly construing purported waivers of the right to counsel.<sup>23</sup>

The State itself contended below that *Jackson* was "not new law,"<sup>24</sup> and the Supreme Court of Mississippi never questioned that contention.<sup>25</sup> Rather, the state court sim-

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<sup>23</sup> Relying on *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Brewer v. Williams*, 430 U.S. 387 (1977), the Court in *Jackson* described its precedents as establishing a "settled approach to questions of waiver." *Michigan v. Jackson*, 475 U.S. at 633 (emphasis added). The Court in *Jackson* also relied on its Fifth Amendment decision in *Edwards v. Arizona*, 451 U.S. 477 (1981), noting that the decision in *Edwards* stemmed in part from earlier Sixth Amendment cases. *Michigan v. Jackson*, 475 U.S. at 635 & n.9; see also *supra* note 13.

<sup>24</sup> See *supra* note 20. Even if *Jackson* were deemed in some sense a change in law, it certainly is not a "clear break" with past precedent and should be applied retroactively in this case. See *Fleming v. Kemp*, 837 F.2d 940 (11th Cir. 1988) (concluding that *Jackson* established new law, but nevertheless holding that it should apply retroactively in a federal habeas corpus proceeding with respect to a Sixth Amendment claim involving the sentencing phase of a death penalty case). But see *Delaware v. Flamer*, No. IK79-11-0236 (Del. Supr. Ct. June 29, 1987) (LEXIS, States library, Del. file).

<sup>25</sup> Indeed, it appears *sub silentio* to have so held in another case. In *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), a death row inmate filed a motion for post-conviction relief. Relying on *Jackson*, Johnson argued (among other things) that a confession had been elicited from him in violation of his Sixth Amendment right to counsel. Johnson had not raised the Sixth Amendment claim in his direct appeal, and the Supreme Court of Mississippi held that there was not adequate "cause" to excuse the waiver. *Id.* at 1127. The

ply disregarded *Yates* and the standards for retroactive application of decisions of constitutional law that this Court has developed. The Supreme Court of Mississippi appears to have proceeded on the premise that even if this Court's precedents required that *Jackson* be applied retroactively in collateral proceedings, it could nevertheless ignore *Jackson* because of the previous dispositions of Petitioner's Sixth Amendment claim.

That premise is invalid. As this Court has stressed, *res judicata* has no applicability when "between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 162 (1945).<sup>26</sup>

The implications of the decision below are potentially far-reaching. If a state court in a collateral proceeding can refuse on *res judicata* grounds to honor an intervening decision by this Court—even if that decision applies retroactively in collateral proceedings—then *Yates* will be of little if any significance. Under the Mississippi Collateral Relief Act, as with the post-conviction relief procedures of many states, the failure to assert on direct appeal a claim that could have been raised at that stage

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State, in the present case, read the opinion of the Supreme Court of Mississippi in *Johnson* as holding that *Jackson* "is not new law." Response [to] Petition for Partial Rehearing, at 7 (Dec. 14, 1987). The Fifth Circuit in a federal habeas corpus proceeding involving the same defendant expressly held that *Jackson* "did not create a new rule of law" and that therefore Johnson's failure to raise the claim in earlier federal habeas corpus proceedings amounted to an abuse of the writ. *Johnson v. Cabana*, 818 F.2d 333, 344 (5th Cir. 1987).

<sup>26</sup> Accordingly, this Court has held that the rejection by a federal court of a federal constitutional claim is not an automatic bar to reconsideration of the claim in a subsequent federal habeas corpus proceeding when there has been an intervening relevant decision. See *Davis v. United States*, 417 U.S. 333, 342 (1974); *Sanders v. United States*, 373 U.S. 1, 17 (1963). But cf. *Kuhlmann v. Wilson*, 477 U.S. 436, 444-56 (1986) (opinion of four Justices).

generally bars consideration of the claim in a post-conviction proceeding.<sup>27</sup> The Supreme Court of Mississippi has relied in recent years on this principle in numerous post-conviction cases in which it has held that claims have been waived; indeed, it has done so in a post-conviction case raising a *Jackson* claim.<sup>28</sup> Accordingly, if the decision below is allowed to stand, intervening decisions that under *Yates* apply retroactively in collateral proceedings could nonetheless be disregarded in those proceedings: if the defendant failed to raise the issue on direct appeal, he will be held to have waived the claim; if he raised the issue on direct appeal, the disposition of the issue there will be held under the doctrine of *res judicata* to bar any consideration of the issue in light of the intervening decision.

This is not an isolated case. In another recent death penalty case, *Wiley v. State*, 517 So. 2d 1373 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520), the Supreme Court of Mississippi likewise refused on *res judicata* grounds to apply an intervening decision of this Court. At Wiley's sentencing hearing, the victim's wife was allowed to testify about her husband's character. On direct appeal, the Supreme Court of Mississippi upheld the admission of the testimony. *Wiley v. State*, 484 So. 2d 339 (Miss.),

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<sup>27</sup> Miss. Code Ann. § 99-39-21(1) (Cum. Supp. 1987). The statute authorizes state courts not to enforce the waiver rule when the defendant demonstrates "cause" and "actual prejudice," but the existence of an intervening decision that applies established legal principles to a new fact situation does not satisfy the "cause" requirement. See Miss. Code Ann.—§ 99-39-21(4) (Cum. Supp. 1987); cf. *Smith v. State*, 434 So. 2d 212, 215 n.3 (Miss. 1983); see also *supra* note 25.

<sup>28</sup> See *supra* note 25; see also, e.g., *Wiley v. State*, 517 So. 2d 1373, 1378 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520); *Wilcher v. State*, 479 So. 2d 710, 712 (Miss. 1985), *cert. denied*, 475 U.S. 1098 (1986); *Leatherwood v. State*, 473 So. 2d 964, 966 (Miss. 1985).

*cert. denied*, 107 S. Ct. 304 (1986). Wiley subsequently filed for post-conviction relief, relying on this Court's intervening decision in *Booth v. Maryland*, 107 S. Ct. 2529 (1987). Without considering the retroactive effect of *Booth*, the Supreme Court of Mississippi held that its disposition of the issue on direct appeal barred further consideration of the point. *Wiley v. State*, 517 So. 2d at 1377.

On at least two separate recent occasions, the Supreme Court of Mississippi has thus refused to apply intervening decisions of this Court without regard to their retroactivity. In order to ensure that *Yates v. Aiken* is not an empty gesture, the Court should grant certiorari to make plain that state courts cannot, on *res judicata* grounds, refuse to honor intervening decisions by this Court that apply retroactively.

**II. The Decision Below Raises Important Questions About the Authority of State Courts To Refuse To Consider Federal Constitutional Claims on the Basis of State Procedural Rules That Are Not Uniformly and Evenhandedly Enforced.**

Even if state courts can under some circumstances apply state rules of *res judicata* and thereby refuse to honor intervening decisions of this Court, the court below could not constitutionally do so here. In a number of other cases also on collateral review, the Supreme Court of Mississippi has reconsidered claims that it had previously addressed on direct appeal where there had been an intervening decision that called into question the earlier resolutions of the claims. In the present case and in *Wiley*, the Supreme Court of Mississippi has disregarded its prior practice without explanation. This case thus presents important questions concerning the authority of state courts to refuse to consider the merits of federal claims on the basis of a state procedural rule—in this case, *res judicata*—that the state court has not applied uniformly and evenhandedly.

The inconsistency between the refusal by the Supreme Court of Mississippi to consider the merits of Mr. Jordan's *Jackson* claim in this case and its practice in other cases is readily apparent. In *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983), a post-conviction proceeding, the Supreme Court of Mississippi refused to reconsider several claims that Edwards had raised on direct appeal, invoking the principle that issues addressed on direct appeal "are res judicata and barred." *Id.* at 907; *see also id.* at 908. The court, however, reconsidered one claim that Edwards had similarly raised on direct appeal—that the imposition of the death penalty on him was disproportionate and arbitrary—evidently because Edwards based his reassertion of the claim on this Court's intervening decision in *Enmund v. Florida*, 458 U.S. 782 (1982). *Edwards v. Thigpen*, 433 So. 2d at 908. Similarly, in *Culberson v. State*, 412 So. 2d 1184 (Miss. 1982), the Supreme Court of Mississippi granted post-conviction relief with respect to a claim of ineffective assistance of counsel that had been raised and rejected on direct appeal from Culberson's second conviction and death sentence. The court reached this result based on this Court's intervening decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980).<sup>29</sup>

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<sup>29</sup> Culberson had claimed in his direct appeal that his trial counsel had refused to allow him to testify in his own behalf. The Supreme Court of Mississippi had rejected the claim on the ground that a defendant who retains counsel waives the right to challenge his lawyer's competence. *Culberson v. State*, 379 So. 2d 499 (Miss. 1979), *cert. denied*, 449 U.S. 986 (1980). After the appeal had been decided, this Court issued its decision in *Cuyler*, holding that a defendant is entitled under the Sixth Amendment to effective assistance of counsel whether counsel is appointed or retained. In Culberson's subsequent collateral proceeding, the Supreme Court of Mississippi—relying on *Cuyler*—granted a writ of error coram nobis and remanded for an evidentiary hearing to determine whether Culberson's counsel had prevented him from testifying. *Culberson v. State*, 412 So. 2d at 1185-86.



Citing *Culberson* and several other cases, the Supreme Court of Mississippi declared in unequivocal terms—as recently as 1983—that “Mississippi post-conviction relief procedures may be employed to either obtain relief under a retroactively applied court decision, or to test the retroactivity of such a decision.” *Smith v. State*, 434 So. 2d 212, 215 (Miss. 1983). Yet that is precisely what the Supreme Court of Mississippi has not allowed in this case. It has refused to consider the retroactivity of *Jackson* on a state-law ground—*res judicata*—that it previously had not deemed dispositive in other cases.<sup>30</sup> It has done so without explanation even though Mr. Jordan specifically called the court’s attention to the inconsistency between its holding here and those in *Edwards* and *Culberson*.<sup>31</sup>

Given its prior contrary practice, the Supreme Court of Mississippi cannot in this case invoke *res judicata* and refuse to consider Mr. Jordan’s *Jackson* claim. “State courts may not avoid deciding federal issues by invoking state procedural rules that they do not apply evenhandedly to all similar claims.” *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982); see also *James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (only state procedural rules that are “firmly established and regularly followed . . . can prevent implementation of federal constitutional rights”).

The inconsistency between the state court’s refusal to consider the *Jackson* claim in this case and Mississippi practice elsewhere is underscored by the Mississippi Collateral Relief Act. Under the terms of that statute, the denial of an application for post-conviction relief gen-

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<sup>30</sup> At least until recently, the Supreme Court of Mississippi had similarly not applied its waiver rule consistently in post-conviction cases, often reaching the merits of claims that had not been raised on direct appeal. See *Wheat v. Thigpen*, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1566 (1987).

<sup>31</sup> See Brief in Support of Petition for Partial Rehearing, at 2-3 (Oct. 8, 1987); Petitioner’s Reply to State’s Response to Petition for Partial Rehearing, at 1-2 (Dec. 28, 1987).

erally bars a second application. Miss. Code Ann. § 99-39-23(6) (Cum. Supp. 1987). But the statute specifically exempts from this prohibition cases "in which the prisoner can demonstrate . . . that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction." *Id.*<sup>32</sup>

Without any mention of its earlier decisions in *Edwards* and *Culberson*,<sup>33</sup> the Supreme Court of Mississippi has recently construed the statutory exception not to apply with respect to an issue raised and decided on direct appeal. It has held that the exception does not preclude the court from invoking *res judicata* and refusing to reach the merits of a post-conviction claim where the defendant raised the issue in question originally on direct

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<sup>32</sup> See also Miss. Code Ann. § 99-39-27(9) (Cum. Supp. 1987) (providing that a denial by the Supreme Court of Mississippi of leave to file an application under the Collateral Relief Act generally bars a second application *except where there has been an intervening decision*). Mr. Jordan below relied on §§ 99-39-23(6) and 99-39-27(9), arguing that in light of those provisions the state court's *res judicata* holding denied him due process and equal protection under the federal constitution. See Brief in Support of Petition for Partial Rehearing, at 1-2, 6-8 & n.5 (Oct. 8, 1987); Mr. Jordan's Reply to State's Response to Petition for Partial Rehearing, at 1 (Dec. 28, 1987); see also Brief in Support of Application for Leave to File Motion to Vacate and Set Aside Conviction, at 6-7 (April 13, 1987).

<sup>33</sup> Those cases were decided before the passage of the Mississippi Collateral Relief Act. The Supreme Court of Mississippi has held, however, that the Mississippi Collateral Relief Act simply codified the post-conviction procedures established in state *coram nobis* and habeas corpus cases. See, e.g., *Irving v. State*, 498 So. 2d 305, 308 (Miss. 1986), *cert. denied*, 107 S. Ct. 1986 (1987); see also Miss. Code Ann. § 99-39-3(1) (stating that "[t]he relief formerly accorded by [writs of error *coram nobis* and habeas corpus] may be obtained by an appropriate motion under [the Mississippi Collateral Relief Act]").



appeal; instead, it has read the statute as only providing an exception from "the prohibition of second petitions." *Wiley v. State*, 517 So. 2d 1373, 1377 (Miss. 1987), *petition for cert. filed*, 56 U.S.L.W. 3667 (U.S. Mar. 29, 1988) (No. 87-1520). Thus the law in Mississippi, after the decisions in *Jordan* and *Wiley*, appears to be as follows: if a defendant raises a claim on direct appeal, he will be precluded on *res judicata* grounds from relitigating the issue in a post-conviction proceeding even where there has been an intervening decision that demonstrates that the resolution of the claim on direct appeal was wrong as a matter of federal constitutional law; however, if a defendant raises a claim initially in a post-conviction proceeding—and his failure to raise the issue on direct appeal does not constitute a waiver of the claim<sup>34</sup>—he will be permitted to relitigate the issue in a second post-conviction proceeding based on an intervening decision.

As Mr. Jordan argued below,<sup>35</sup> there is no rational basis for Mississippi to distinguish, for *res judicata* purposes, between defendants who initially raised their claim on direct review and defendants who initially raised their claim in a post-conviction proceeding.<sup>36</sup> Even if a state court could refuse in all post-conviction proceedings to

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<sup>34</sup> The Supreme Court of Mississippi has held that some claims may be raised in the first instance in a post-conviction proceeding. See, e.g., *Wiley v. State*, 517 So. 2d at 1378 (claim of ineffective assistance of trial counsel in a case in which trial counsel also represented the defendant on direct appeal).

<sup>35</sup> See Brief in Support of Petition for Partial Rehearing, at 7 n.7 (Oct. 8, 1987).

<sup>36</sup> Cf. *Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that an intervening decision may entitle a petitioner in a federal habeas corpus proceeding to a new hearing with respect to a claim had been previously resolved, whether the claim had been previously resolved in an earlier federal collateral proceeding or on direct review of the conviction).

honor intervening decisions of this Court, it violates equal protection and due process for a state court to do so only in some cases based on arbitrary distinctions between the defendants involved. See *Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971) ("For 'it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts'") (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966)).<sup>37</sup> Moreover, Mississippi's apparent willingness to ignore *res judicata* principles and to consider the merits of reasserted claims in post-conviction cases in which the defendant raised the claim initially in an earlier post-conviction proceeding demonstrates that Mississippi has "no substantial state interest" that could warrant its application of *res judicata* here and consequent refusal to consider Mr. Jordan's *Jackson* claim. *Henry v. Mississippi*, 379 U.S. 443, 449 (1965); see also *James v. Kentucky*, 466 U.S. at 348-49 (1984).

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<sup>37</sup> An arbitrary denial of a state-provided remedy violates due process. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393-94, 400-01 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980). And, as the Court held in *Yates*, a state court considering federal claims in state post-conviction proceedings must provide the relief required by federal law. *Yates v. Aiken*, 108 S. Ct. at 538.

## CONCLUSION

For the reasons stated, we respectfully request that the Court grant certiorari. We also respectfully suggest that the Court may wish to consider remanding this case to the Supreme Court of Mississippi for further consideration in light of *Yates v. Aiken*, 108 S. Ct. 534 (1988).

Respectfully submitted,

JOSEPH P. HUDSON  
LAWYER AND HUDSON  
Post Office Box 908  
Gulfport, MS 39501

EARL B. STEGALL  
Post Office Box 1542  
Gulfport, MS 39501

TIMOTHY N. BLACK \*  
PHILIP D. ANKER  
MAXWELL O. CHIBUNDU  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

*Counsel for Petitioner*

May 2, 1988

\* Counsel of Record



# **APPENDIX**

ALPHABET

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

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DP-44

RICHARD GERALD JORDAN

v.

STATE OF MISSISSIPPI

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ON REMAND FROM THE  
UNITED STATES SUPREME COURT

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR  
THE COURT:

The Court considers this case today upon remand to the Supreme Court of Mississippi after the United States Supreme Court granted a petition for writ of certiorari. *Richard Gerald Jordan, Petitioner v. Mississippi*, 106 S.Ct. 1942 (1986). The U. S. Supreme Court vacated the judgment imposing the death penalty upon Jordan and remanded to this Court for further consideration in the light of *Skipper v. South Carolina*, 476 U.S. —, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

Richard Gerald Jordan was first tried and found guilty on June 21, 1976, for the capital murder of Mrs. Edwina Marter. The conviction was prior to the decision in *Jackson v. State*, 337 So. 2d 1242 (Miss. 1976), which provided guidelines and bifurcated trials in capital murder cases. The lower court granted a motion for new

trial under the precedents of *Jackson* and *Jordan* was tried, convicted and sentenced to death a second time. The conviction and sentence were affirmed in *Jordan v. State*, 365 So. 2d 1198 (Miss. 1978). Subsequently, the United States Fifth Circuit Court of Appeals vacated the sentence on habeas corpus petition and remanded for another sentencing hearing, holding that under *Godfrey v. Georgia*, 446 So. 2d 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the instructions of the trial court failed to channel the sentencer's discretion by clear and objective standards and did not provide specific and detailed guidance.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District, and the jury imposed the death penalty on Jordan April 29, 1983, being the third time Jordan had been sentenced to death. That death sentence was affirmed by this Court January 30, 1985, and rehearing was denied March 13, 1985. *Jordan v. State*, 464 So. 2d 475 (Miss. 1985). Appellant then filed a petition for writ of certiorari with the United States Supreme Court on May 13, 1985, citing three grounds for relief. One such ground was sustained and follows:

1. Whether, in a capital sentencing proceeding, exclusion of virtually all evidence of a defendant's socially useful behavior while in prison and other mitigating evidence is consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and the requirement of individualized sentencing.

In *Skipper*, following the introduction by the State of evidence in aggravation of the offense, petitioner presented as mitigating evidence his own testimony and that of his former wife, his mother, his sister and his grandmother. Testimony, for the most part, concerned the difficult circumstances of his upbringing. Petitioner and his former wife, however, both testified briefly that



petitioner had conducted himself well during the 7-1/2 months he spent in jail between his arrest and trial, and petitioner further testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment, rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family. In addition, he sought to introduce testimony of two jailers and one regular visitor to the jail to the effect that petitioner had made a good adjustment during his time spent in jail. The South Carolina trial court ruled that under the decision of the South Carolina Supreme Court in *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), such evidence would be irrelevant and inadmissible.

The U.S. Supreme Court stated the following:

Accordingly, the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. The State does not contest that the witnesses petitioner attempted to place on the stand would have testified that petitioner had been a well-behaved and well-adjusted prisoner, nor does the State dispute that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, see *Koon I*, *supra*, at 536, 298 SE2d, at 774, there is no question but that such inferences would be "mitigating" in the sense that they might serve "as a basis for a sentence less than death." *Lockett*, *supra*, at 604, 71

L Ed 2d 1, 102 S Ct 869. Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek v. Texas*, 428 US 262, 275, 49 L Ed 2d 929, 96 S Ct 2950 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an "aggravating factor" for purposes of capital sentencing, *Jurek v. Texas*, supra; see also *Barefoot v. Estelle*, 463 US 880, 77 L Ed 2d 1090, 103 S Ct 3383 (1983). Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration.

476 U.S. at —, 106 S.Ct. at 1771, 90 L.Ed.2d at 6-7. See also *Dutton v. Brown*, 812 F.2d 593, 600-602 (10th Cir. 1983).

During the sentencing phase of the trial, Jordan introduced testimony in mitigation from sixteen (16) witnesses in addition to his own testimony. Of those sixteen people, six (6) were family members, five (5) were friends, three (3) were jail inmates and prison chaplains, a prison guard and a pathologist. They testified to his life during childhood and boyhood, as a husband and father, engaging in sports, as a church member. All of the testimony was favorable and praiseworthy of the appellant. Lucius Brown, a prison guard, testified that he had chosen Jordan to be a "hall man" with certain responsibilities in the prison and toward other inmates and was highly complimentary of his conduct.

Jordan contends that the lower court impermissibly restricted testimony concerning mitigating facts, *e.g.*, certain parts of testimony of Robert Jordan, brother of appellant, Shirley Thames, first cousin, Lucius Brown, prison guard, and the entire testimony of Rhett Russell. In the original opinion, entered January 30, 1985, this Court discussed the evidence of each of those witnesses and concluded that the restriction imposed by the trial court on the first three and exclusion of the testimony of Rhett Russell did not constitute reversible error. *Skipper v. South Carolina*, *supra*, decided April 29, 1986, holds otherwise. In concluding its opinion, the U.S. Supreme Court said:

The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. *Eddings*, 455 US, at 117, 71 L Ed 2d 1, 102 S Ct 869. The judgment of the Supreme Court of South Carolina is therefore reversed insofar as it affirms the death sentence, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

476 U.S. at —, 106 S.Ct. at 1773, 90 L.Ed.2d at 9.

The testimony of Rhett Russell, as proffered, was to the effect that he would testify about a method for generating electricity from an alternative energy source, as it is known, through wind tunnels and things of that nature; that Mr. Jordan has been in contact with the

Tennessee Valley Authority over this invention and has entered into an agreement with them about it; and that Mr. Russell is familiar with all those details and would testify about them.

The State advances several reasons why this Court should not remand for a new sentencing hearing, although conceding that "under the ruling in *Skipper* we now know that this type material is relevant and the opinion of this Court to the contrary is erroneous."

We are not persuaded by the argument of the State in the light of the holding in *Skipper v. South Carolina*, *supra*. Therefore, this cause is remanded to the Circuit Court of Harrison County, Mississippi, for a new sentencing hearing.

REMANDED TO THE CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI, FOR SENTENCING HEARING, CONSISTENT WITH THIS OPINION.

WALKER, C.J., HAWKINS, P.J., DAN LEE, PRATHER, ROBERTSON, SULLIVAN, ANDERSON and GRIFFIN, JJ., CONCUR.

ON APPLICATION FOR LEAVE TO FILE MOTION  
TO VACATE AND SET ASIDE CONVICTION

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR  
THE COURT:

Richard Gerald Jordan has filed an Application for Leave to File Motion to Vacate and Set Aside Conviction, pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Ch. 378, Miss. Gen. Laws 1984, Mississippi Code Annotated § 99-39-7 and § 99-39-27 (Supp. 1986). The motion to vacate and set aside the conviction and the relief prayed for is based on the United States Supreme Court's decision in *Michigan v. Jackson*, 106 S.Ct. 1404 (1986). Jordan claims that the admission at trial of tape recorded statements taken from him outside the presence of counsel violated his Sixth Amendment rights.

Jordan first presented this question on his direct appeal decided in 1978 and the issue was resolved against him at that time. See *Jordan v. State*, 365 So. 2d 1198, 1201-03 (Miss. 1978). The question was next raised in a federal habeas corpus proceeding where it was denied. The Court of Appeals for the Fifth Circuit addressed the issue on appeal on the denial of habeas relief by the District Court and found that no error was involved and denied any relief on those grounds. *Jordan v. Watkins*, 681 F.2d 1067, 1070-75 (5th Cir. 1982). The issue was not addressed in the opinion on petition for rehearing before the Fifth Circuit. Jordan again raised the question on direct appeal from his resentencing. In response, this Court quoted from the opinion of the Fifth Circuit and held: "We are of the opinion that the State met its burden with respect to Jordan and that the question is now res judicata." *Jordan v. State*, 464 So. 2d 475, 480 (Miss. 1985). The issue was not raised in Jordan's peti-

tion for writ of certiorari from his last death sentence affirmance.

We are of the opinion that Jordan's conviction of capital murder became final in 1982 when the Fifth Circuit upheld his conviction of capital murder and he did not petition the United States Supreme Court to review that decision. We hold that the question is *res judicata* and is barred from relitigation.

Therefore, the application is denied.

APPLICATION DENIED.

WALKER, C.J., HAWKINS, P.J., DAN LEE,  
PRATHER, ROBERTSON, SULLIVAN, ANDERSON  
and GRIFFIN, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI  
DECISIONS HANDED DOWN FEBRUARY 10, 1988

\* \* \* \*

THE COURT SITTING EN BANC:

\* \* \* \*

DP-44 Richard Gerald Jordan v. State; Circuit,  
Harrison; Petition for Rehearing Denied.  
Petition for Writ of Mandamus Denied  
Without Prejudice to Proceed in Circuit  
Court of Harrison County.

\* \* \* \*

MANDATE FROM THE  
SUPREME COURT OF MISSISSIPPI

TO THE CIRCUIT COURT OF HARRISON  
COUNTY—GREETINGS:

WHEREAS, on the 23rd day of September, 1987, the same being a day of the regular term of the Mississippi Supreme Court, begun and held in the Courtroom, in the Gartin Building, in the City of Jackson, Mississippi, on the 2nd Monday of September, in the year of our Lord, 1987, the following final judgment was rendered by the Mississippi Supreme Court, to-wit:

DP-No. 44

RICHARD GERALD JORDAN

VS.

STATE OF MISSISSIPPI

This cause having been submitted on remand from the United States Supreme Court, and this Court, having considered the same, is of the opinion that the cause should be remanded to the Circuit Court of Harrison County, Mississippi, for sentencing hearing consistent with the opinion of the Supreme Court.

The Application for Leave to File Motion to Vacate and Set Aside Conviction is denied.

WEDNESDAY, FEBRUARY 10, 1988:

This cause came on to be heard on Petition for Re-hearing and this Court having considered the same is of the opinion that the same should be denied and same is hereby denied. The Petition for Writ of Mandamus is hereby denied without prejudice to proceed in the Circuit Court of Harrison County.



YOU ARE THEREFORE HEREBY COMMANDED,  
that such execution and further proceedings be had in  
said cause, as according to right and justice, and the  
judgment of our SUPREME COURT and the law of the  
land ought to be had.

WITNESS, the Hon. Roy Noble Lee  
Chief Justice of the Mississippi Su-  
preme Court; also the signature of  
the Clerk and the Seal of said Court  
hereunto affixed, at office, in the City  
of Jackson, this the 14th day of  
March, A.D., 1988

/s/ Sue Gordon, Clerk  
\_\_\_\_\_ D.C.

(Trial Court #18,807.)

(2)

Supreme Court, U.S.  
**FILED**

**JUN 24 1988**

**JOSEPH F. SPANIOLO, JR.**  
CLERK

**No. 87-1797**

**In The Supreme Court of the United States**  
**October Term, 1987**

**RICHARD GERALD JORDAN**  
PETITIONER

**VERSUS**

**STATE OF MISSISSIPPI**  
RESPONDENT

---

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**BRIEF IN OPPOSITION**

---

**MIKE MOORE**  
ATTORNEY GENERAL  
STATE OF MISSISSIPPI

**MARVIN L. WHITE, JR.**  
ASSISTANT ATTORNEY GENERAL  
COUNSEL OF RECORD

OFFICE OF THE ATTORNEY GENERAL  
POST OFFICE BOX 220  
JACKSON, MISSISSIPPI 39205  
TELEPHONE (601) 359-3680

**COUNSEL FOR RESPONDENT**

He P



## QUESTIONS PRESENTED

1. Where petitioner's conviction for capital murder became final on both direct and collateral review in 1982 the principles of res judicata do apply and the court below properly so held, certiorari should be denied.

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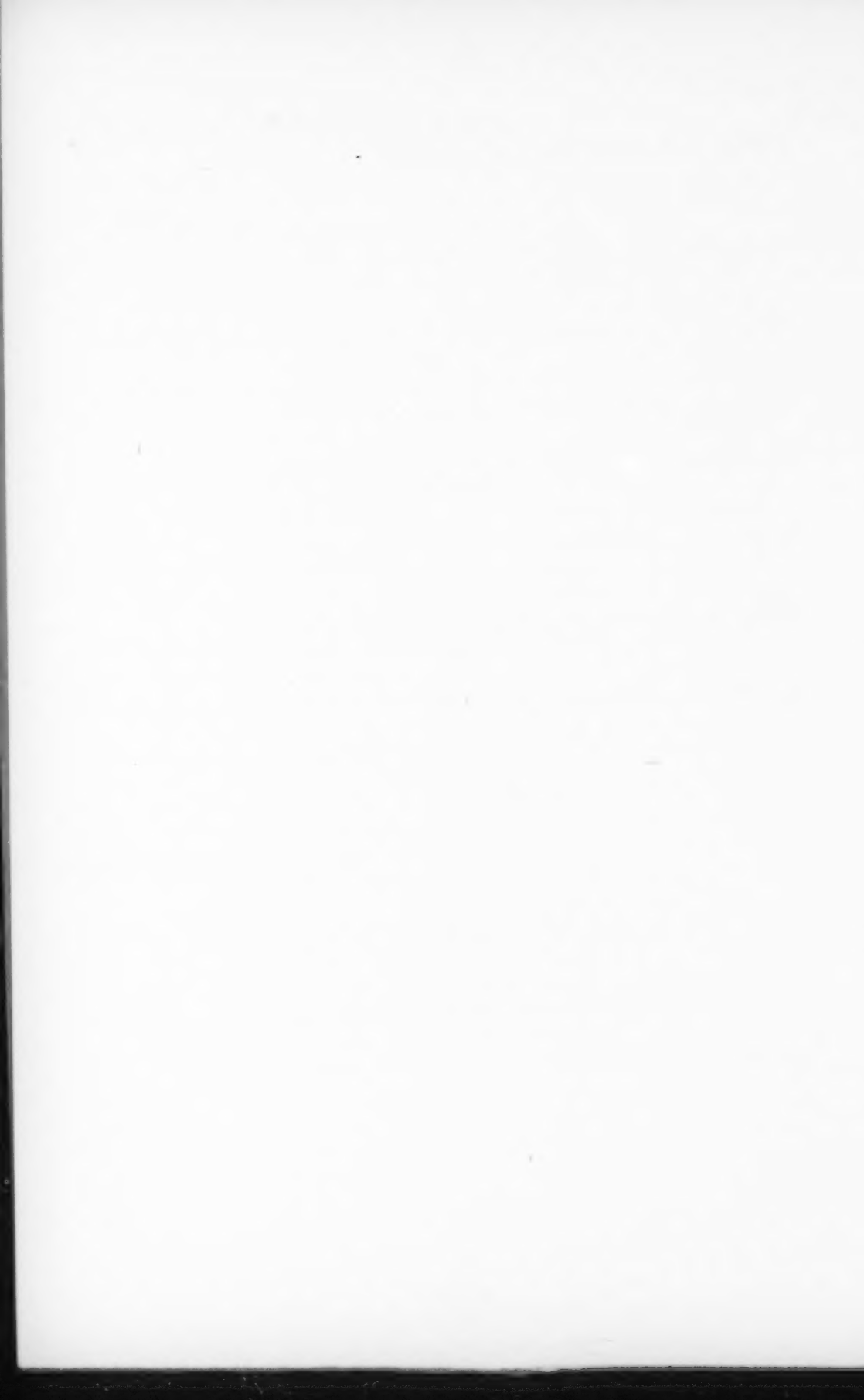
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NO. 87-1797

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1987

RICHARD GERALD JORDAN,  
Petitioner,

v.

STATE OF MISSISSIPPI,  
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi,  
respectfully prays that the Petition for  
Writ of Certiorari to the Supreme Court of  
the State of Mississippi be denied in this  
case.

OPINION BELOW

The opinion of the Supreme Court of the  
State of Mississippi is reported as Jordan  
v. State, 518 So.2d 1186 (Miss. 1987). A  
copy of the opinion is before the Court in

petitioner's Appendix to Petition for Writ of Certiorari to the Supreme Court of Mississippi at 1a-8a.

#### JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S. § 1257(3). He fails to do so.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioner seeks to invoke the provisions of the Constitution of the United States, Amendments VI and XIV. He also relies on Sections 99-39-21(3); 99-39-23(6); 99-39-27(9), Miss. Code Ann. (Supp. 1984).

#### STATEMENT OF THE CASE

The petitioner, Richard Gerald Jordan, was indicted on March 26, 1976, in the

Circuit Court of the First Judicial District of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the matter was transferred to the Circuit Court of Jackson County, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial the Mississippi Supreme Court decided Jackson v. State, 337 So.2d 1242 (Miss. 1976), holding that automatic imposition of the death penalty was improper. The trial court granted petitioner's motion for a new trial and Jordan was again put to trial under the guidelines imposed by the state court in Jackson, supra, concerning jury sentencing. Jordan was again convicted of capital murder and sentenced to death, this time by the jury in a bifurcated proceeding. The

Mississippi Supreme Court affirmed the conviction and sentence on direct appeal and rehearing was denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). Petitioner then petitioned the state supreme court for post-conviction relief. This petition for writ of error coram nobis was denied. In re Jordan, 390 So.2d 584 (Miss. 1980).

On January 3, 1980, prior to filing his petition for coram nobis relief, Jordan filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. These proceedings were stayed pending exhaustion of all claims in the state courts. On March 19, 1981 the Honorable William Harold Cox, United States District Judge, denied the

petition, and an appeal to the Court of Appeals for the Fifth Circuit ensued. On August 6, 1982, the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. Thereafter a petition for rehearing was denied. Jordan v. Watkins, 681 F.2d 1967, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). Neither the state nor petitioner elected to file a petition for writ of certiorari with this Court.

A new sentencing hearing was held by the Circuit Court of Harrison County, Mississippi, First Judicial District and a death sentence returned in proper form by the jury on April 29, 1983. This marked the third time that Jordan had been sentenced to death. On automatic appeal to the Mississippi Supreme Court the sentence of

death was again affirmed on January 30, 1985. Rehearing was denied on March 13, 1985. Jordan v. State, 464 So.2d 475 (Miss. 1985).

Petitioner took a petition for certiorari to this Court raising three questions, none of them the present one. This Court granted certiorari on 1986, vacated the death sentence and remanded it for reconsideration light of Skipper v. South Carolina, 476 U.S. 1 (1986). Jordan v. Mississippi, 476 U.S. 1101 (1986).

On remand the court below ordered a new trial on the issue of sentence. While the remand matter this was pending, petitioner filed a second post conviction petition challenging his original conviction. This was disposed of along with the remand question in the opinion presently under

consideration. Jordan v. State, 518 So.2d 1186, 1189.

The facts reflected by the record show, that on or about January 10, 1976, in Baton Rouge, Louisiana, petitioner, traded a shotgun for a .38-calibre revolver. Then he traveled to Gulfport, Mississippi, and obtained lodging at the Twin Star Motel where he registered as "Jack Wilson." With kidnapping in his mind, and using the fictitious name of "Jack Wilson," Jordan called the Gulf National Bank and expressed a desire to speak to the commercial loan officer. He was referred to Mr. Marter, whose wife was soon to be Jordan's victim. Perusal of the telephone directory revealed to Jordan only one Gulfport listing of the name "Marter." Having obtained the Marter address from the directory, Jordan drove by the Marter residence where several cars were



parked, including a Mercedes and a sports car. After all but one of the cars was driven away, Jordan dialed the Marter residence telephone number and heard a female's voice answer. Then he decided to make his move.

Dressed in a sport coat, tie and knit pants, and carrying a manila folder, Jordan went to the Marter residence. He rang the door bell and was greeted by Mrs. Marter whom he told that his electrical company had received information of defective circuit breakers in the area which he was investigating. Mrs. Marter admitted him inside, whereupon he kidnapped Mrs. Marter at gunpoint and took her away, leaving her three-year-old son asleep in the house. At his command, she drove him out into the sparsely settled and wooded area of the DeSoto National Park. They traveled down a

logging road and stopped. Jordan ordered her out of the car, telling her that she would stay there with his partner until he obtained money from her husband after which he would release her. She became extremely fearful when she discovered there was no partner present. Petitioner forced Mrs Marter onto her knees and shot her in the back of the head.<sup>1</sup> He then went to a telephone and called Mr. Marter at the bank. Demanding \$25,000, Jordan stated: "We have your wife . . ." and gave Marter directions how to deliver the money on Highway 49 north of Gulfport. Marter quickly obtained the money, but his efforts to drop it failed because he could not find the coat (along side the highway) upon which

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<sup>1</sup> Jordan, a self-described marksman, claims he shot Marter in the back of the head as she was running away from him.

he was supposed to drop the money. Being fearful of a trick on account of two vehicles following Marter, Jordan decided not to put the coat beside the highway.

Jordan took the .38-calibre revolver (the murder weapon) and threw it into the Big Biloxi River, from which it was later recovered after he revealed its location. Before Mr. Marter again attempted to deliver the money, as directed by a second telephone call from Jordan, the money was serialized and microfilmed by FBI officers investigating the matter. During this second telephone conversation between Jordan and Mr. Marter, Jordan assured Marter that his wife was all right, and demanded that Marter drop the money on Interstate Highway 10. Marter Proceeded as Jordan directed; this time he found the coat and dropped the

money on it. Two officers, Deputy Sheriff Larkin Smith and FBI Agent Shepherd, having been made aware of what was going on, were positioned near the scene of the drop and saw Jordan place a coat there. Soon they saw him pick up the money, after which they gave chase at high speed. During the chase, Jordan rammed his car into the vehicle of the officers, running them off the road. They shot at his receding car, but Jordan continued his flight although his car was rendered partially disabled in the ramming episode. Jordan later abandoned his vehicle at a shopping center, hid the money in some nearby woods, proceeded to another shopping center, and purchased a red jump-suit which he donned before he left the store. He got a taxi at the shopping center and told the driver to take him to the Twin Star Motel. Not knowing that Jordan was the man for whom

a man hunt search was under way, the taxi drive told Jordan that roadblocks were up and that the officers were looking for someone. En route to the motel, the taxi was stopped. Jordan was identified from a picture obtained by the FBI. The officer arrested Jordan and turned him over to the FBI. That afternoon, January 13, 1976, Mrs. Marter's body was found. On the next day a diver from the Gulfport Fire Department retrieved the murder weapon from the river.

#### REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of sufficient substance that would warrant the granting of this petition for writ of certiorari.

#### ARGUMENT

In order to completely understand the position of the state as to why this claim

petitioner continues to assert is barred by the doctrine of res judicata and law of the case and waiver we must look to the long procedural history of this case. Petitioner was indicted for capital murder on March 26, 1976, by the grand jury of the First Judicial District of the Circuit Court of Harrison County, Mississippi for the January 13, 1976 kidnapping and murder of Edwina Marter. On motion for change of venue the trial was transferred to the Circuit Court of Jackson, Mississippi where petitioner was tried and automatically sentenced to death. Within the time for the granting of a new trial, the Mississippi Supreme Court decided the case of Jackson v. State, 337 So.2d 1242 (Miss. 1976) in response to the rulings in Gregg v. Georgia, 428 U.S. 153 (1976), Profitt v. Florida, 428 U.S. 242 (1976), Jurek v. Texas, 428 U.S. 262 (1976). The

Mississippi Supreme held that automatic imposition of the death penalty was not permissible. The trial court granted petitioner's motion for a new trial and Jordan was again put to trial under the guidelines for a bifurcated trial set forth by the supreme court in Jackson. Jordan was again convicted of capital murder and sentenced to death, this time by the jury in a separate sentencing hearing. Jordan first raised the present issues concerning the confession he gave at trial and the trial court after an evidentiary hearing found the confession to be free and voluntary. The confession issue was next raised before the Mississippi Supreme Court on direct appeal. The court below addressed the issue and found no error in admitting the confession. Finding no other errors the conviction and sentence were affirmed and a petition for

rehearing was later denied. Jordan v. State, 365 So.2d 1198 (Miss. 1979). Petitioner next raised the question before this Court in his petition for certiorari taken from the affirmance on direct appeal. Certiorari was denied by this Court in Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). After denial of his petition for writ of certiorari Jordan then filed a state post-conviction petition in the form of an application for writ of error coram nobis with the court below. He did not raise the confession issue in this post-conviction action. His petition for writ of error coram nobis was denied in a written opinion. In re Jordan, 390 So.2d 584 (Miss. 1980).

Prior to filing the aforementioned petition for writ of coram nobis, Jordan



filed a federal petition for writ of habeas corpus in the United States District Court for the Southern District of Mississippi. In this federal petition Jordan raised the confession question. The federal court stayed all proceedings pending the exhaustion of all claims in the state court. After the denial of the petition for writ of error coram nobis by the state court the federal district court reactivated the federal habeas petition. On March 19, 1981 the United States District Judge, denied the habeas petition, and an appeal was taken to the Court of Appeals for the Fifth Circuit. On August 6, 1982 the Fifth Circuit affirmed in part and reversed in part the decision of the district court, vacating the sentence of death. In affirming the denial of habeas as to the conviction of capital murder the Fifth Circuit decided the confession issue

finding no error in the determination made by the Mississippi Supreme Court or the federal District Court in deciding the issue. A petition for rehearing was filed and later denied. Jordan v. Watkins, 681 F.2d 2067, reh. den. sub. nom., Jordan v. Thigpen, 688 F.2d 395 (5th Cir. 1982). Neither the state nor the petitioner, Jordan, filed a petition for writ of certiorari with this Court. Jordan's conviction for capital murder became final at that point in 1982 and all the issues pertaining to the conviction also became final. Jordan accepted the ruling of the Fifth Circuit when he did not appeal that court's ruling on the confession issue.

Because of the vacation of the death sentence by the Fifth Circuit, a new sentencing hearing was held in the Circuit Court for the First Judicial District of

Harrison County and a death sentence was returned in proper form by the jury on April 29, 1983. During this resentencing hearing the confession issue was raised again. The trial court held that the issue was res judicata and the Fifth Circuit's ruling on the issue was final. This sentence of death marked the third time Jordan had been sentenced on this charge. On automatic appeal tho the Mississippi Supreme Court petitioner again raised the question of the confession. The court below agreeded with the trial court that the issue was res judicata and finding no other error affirmed the sentence of death again on January 30, 1985, rehearing was denied on March 13, 1985. Jordan v. State, 464 So.2d 475 (Miss. 1985).

Petitioner then sought certiorari from the affirmance of this death sentence filing

his petition on May 13, 1985. Petitioner raised three grounds for relief before this Court in that petition. None of the three questions presented to the Court involved the confession issue. Petitioner's statement in his petition that space limitation prevented him from raising the confession argument at that time is specious and cannot excuse the failure to raise the issue even if it had been a live and viable claim at the time. Petitioner again accepted the resolution by the court below that the issue had become final.

On May 5, 1986 this Court granted the petition for writ of certiorari, vacated the sentence of death and remanded the case to the court below for reconsideration in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Jordan v. Mississippi, 476 U.S. 1101, 106 S.Ct.

1942, 90 L.Ed.2d 352 (1986). On remand the Court below ordered briefs be filed on the Skipper issue. Briefs were filed and the issue was joined.

On April 13, 1987 petitioner filed an Application For Leave To File Motion To Vacate And Set Aside Conviction with the court below again raising the confession issue. The state responded. On September 23, 1987 a unanimous court decided both the Skipper issue and the post-conviction motion, petition for rehearing was denied on February 10, 1988. Jordan v. State, 518 So.2d 1186 (Miss. 1987). In reconsidering the case in light of Skipper the court below held that the case must be remanded another sentencing hearing. In a separate accompanying opinion deciding the post-conviction motion, the court once again held that it would not reconsider the

confession issue as it was res judicata. In this opinion, the court below recited the procedural history of the case and concluded:

We are of the opinion that Jordan's conviction became final in 1982 when the Fifth Circuit upheld his conviction of capital murder and he did not petition the United States Supreme Court to review that decision. We hold that the question is res judicata and is barred from relitigation.

518 So.2d at 1189.

Since 1982 the court below has consistently held that the issue is settled. Petitioner cannot overcome the procedural bars applied to this issue simply by raising the issue again at each stage of the litigation and having the court below state that the issue is closed and will not be relitigated. There must be some finality and we would submit that the issue is closed to further litigation and has been since 1982. Both

the doctrines of res judicata and waiver apply here. The issue was litigated and decided against petitioner in both state and federal courts. Further petitioner has waived any right to raise the issue again when he accepted the disposition of the issue by the Fifth Circuit in 1982 without further appeal.

Petitioner attempted both in the court below and attempts again here to excuse his procedural waiver and overcome the bar of res judicata by arguing that the decision in Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), constitutes new law and excuses his failure to raise the claim earlier and also overcomes the bar of res judicata. The court below held in Johnson v. State, 508 So.2d 1126 (Miss. 1987), that a claim raised in a post-conviction context under Jackson

was barred. Later in the same case the issue was presented to the Fifth Circuit in Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1987), cert. den. \_\_\_\_ U.S. \_\_\_\_, 95 L.Ed.2d 861 (1987). In addressing this contention the Fifth Circuit held:

[Petitioner's counsel] further contend that Michigan v. Jackson, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), constitutes new law in this area which excuses the failure to raise this contention previously. The state responds that Jackson is not new law, that it holds only that counsel should be made available after indictment and arraignment, that Johnson had either been indicted nor arraigned at the time he confessed, that Johnson was not arrested until after he confessed, and that his confession was free and voluntary and was properly taken. We agree that Jackson did not create a new rule of law. Johnson's failure to raise the issue is an abuse of the writ.

[Emphasis added.] 818 F.2d at 344.

As stated above petitioner presented this question on his first direct appeal and



had the question addressed and resolved against him in the 1978 opinion of the court below. Jordan v. State, 365 So.2d 1198, 1201-1203 (Miss. 1978). In its opinion the court addressed the question both in a Fifth and Sixth Amendment context relying on Michigan v. Mosley, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313 (1975) and Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). In his petition for certiorari from direct appeal the issue was raised before this Court. This Court did favor his claim with a grant of certiorari on this issue. Jordan v. Mississippi, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

When petitioner filed his first state post-conviction challenging his conviction and sentence he did not raise this issue before the court below. This was the first

time he waived the issue and this default alone would bar petitioner from relitigating the issue further in state court as he abandoned the issue when it could have and should been presented to the court below.

In his federal habeas petition Jordan again raised the issue before the district court and was rebuffed. In its opinion affirming the denial of relief the Fifth Circuit Court of Appeals, in Jordan v. Watkins, 681 F.2d 1067, 1070-1075 (5th Cir. 1982), again addressed both the Fifth and Sixth Amendment claims and found them to be without merit. The Fifth Circuit relied on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and Brewer v. Williams, supra, in deciding the claims against the admission of the confession were

meritless. Speaking to the Sixth Amendment claim the circuit court held:

Appellant also argues that his right to counsel under the sixth and fourteenth amendments was violated by his interrogation in the absence of counsel after adversary proceedings had commenced. It is undisputed that adversary proceedings had commenced when the authorities elicited the recorded confession. "[O]nce adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him." *Brewer v. Williams*, 430 U.S. 387, 401, 97 S.Ct. 1232, 51 L.Ed.2d 424, 438 (1977). This does not mean that at that stage an accused cannot waive his rights under the sixth and fourteenth amendments. *Id.*, 430 U.S. at 405-406, 97 S.Ct. at 1243, 51 L.Ed.2d at 441. Rather, it is "incumbent upon the [prosecution] to prove an intentional relinquishment of a known right or privilege.'" *id.*, 430 U.S. at 404, 97 S.Ct. at 1242, 51 L.Ed.2d at 439. Based on the facts and circumstances previously discussed, we hold that the prosecution met this strict standard with respect to Jordan.

681 F.2d at 1075.

The issue was not addressed further in the opinion on denial of the petition for rehearing by the Fifth Circuit. It is most important at this point to state the petitioner did not challenge, in this Court, the decision of the Fifth Circuit on the confession issue. He accepted the decision of the Fifth Circuit court by failing to appeal the issue further thereby waiving the claim for all time. The conviction for capital murder become final in 1982 under the doctrines of res judicata, law of the case and further litigation is also barred by the doctrine of waiver.

Petitioner cannot say that he did not have the legal tools necessary to raise this issue at that time. Just from the cases cited by the court below on direct appeal and the Fifth Circuit it is clear that the same and similar issues were being litigated

at the time of petitioner's direct appeal and post-conviction proceedings in state and federal court by other counsel. The fact that he had the legal tools available to him at the time to raise the claim demonstrates that there is no reason for the procedural default of abandoning the claim. The language found in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), is worth repetition here:

We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

71 L.Ed.2d at 804.

Murray v. Carrier, 477 U.S. \_\_\_, 106 S.Ct. \_\_\_, 91 L.Ed. 2d 397 (1986); Smith v. Murray, 477 U.S. \_\_\_, 106 S.Ct. \_\_\_, 91 L.Ed.2d 434 (1986).

Petitioner again raised the issue on direct appeal from his resentencing. Consistent with the present ruling the court below quoted from the Fifth Circuit's opinion and held:

We are of the opinion that the State met its burden with respect to Jordan and that the question is now res judicata.

464 So. at 480.

Petitioner again waived the issue by not raising it in his petition for certiorari from this resentencing direct appeal. The issue is barred from relitigation.

As we have pointed out, both the court below and the Fifth Circuit have held that Michigan v. Jackson, is not new law. The

real question before this court was answered by the court below and the Fifth Circuit years ago. The question presented here is actually whether or not Jordan validly waived his right to counsel at the post-arraignment custodial interrogation. Jackson does not stand for the proposition that once counsel has been appointed it can never be waived. In fact Jackson pointed out that Maine v. Moulton, 474 U.S. \_\_\_, 106 S.Ct. 477, 88 L.Ed.2d 115 (1985); United States v. Henry, 447 U.S. 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980); Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) and Massiah v. United States, 377 U.S. 201, 84 S.Ct. 199, 12 L.Ed.2d 246 (1964), were all cases dealing with the question of whether "respondents validly waived their right to counsel at the postarraignment custodial interrogations."

89 L.Ed.2d at 638. See also: 98 L.Ed.2d at 642, fn.9. The issue was addressed and resolved by the court below and the Fifth Circuit. It cannot be relitigated.

Further, even if we were to consider Jackson as new law, it would not be applied retroactively to this case under the recent precedent dealing with new law. Petitioner relied on the decision in Griffith v. Kentucky, 479 U.S. \_\_\_\_\_, 107 S.Ct. \_\_\_\_\_, 93 L.Ed.2d 649 (1987), to state that the claim he makes under Jackson, should be considered. However Griffith, clearly states that it applies to litigation pending on direct state or federal review or not yet final when the decision of the United States Supreme Court is handed down. The Court stated:

We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied



retroactively to all cases, state or federal pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

93 L.Ed. 2d at 661.

Continuing, this Court defined the word "final" as follows:

6. By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied. [Citations omitted.]

93 L.Ed.2d at 657, fn. 6.

The issue at bar has been litigated and direct review of the issue became final in 1979, when this Court finally denied certiorari. Jordan v. State, 365 So.2d 1198, 1201-1203 (Miss. 1978), cert. den., 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979). If that alone were not sufficient, the ruling of the United States Court of

Appeals for the Fifth Circuit in Jordan v. Watkins, 681 F.2d 1067, 1070-1075 (5th Cir. 1982), clearly forecloses any further litigation of the issue. Federal review of the issue is now final since Jordan allowed the Fifth Circuit's decision to stand without a petition for certiorari being filed from that ruling. Petitioner was in no way restrained from filing a petition from certiorari from that ruling with this Court and chose not to do so. The time for filing such a petition has long expired. Clearly the issue was fully litigated according to the law in existence at the time and the issue is res judicata. The rationale of Griffith and Allen v. Harcy, 477 U.S. \_\_\_\_, 106 S.Ct. 2872, 92 L.Ed.2d 199 (1986), is to be applied to all criminal cases. Clearly the decisions rendered by the court below and Fifth Circuit regarding

the admissibility of the confession was final at the time of this Court's decision in Jackson. We submit that the issue has been final for eight (8) years, since the denial of certiorari on direct review where this question was raised. Yates v. Akins, 546 (1988), does not change this position. Further Yates can be distinguished in that the Mississippi Supreme Court has placed limits on the issues it will entertain in collateral proceedings and has not addressed the merits of the federal claim in any proceeding since 1979. The issue of waiver of the right to counsel was decided at that time and the issue is closed.

Petitioner's claim that the procedural bar is not regularly applied by the court below is easily distinguishable from the case at bar. Neither cited case was in the same procedural position as the case at

bar. In Edwards v. Thigpen, 433 So.2d 906 (Miss. 1983), the Mississippi Supreme Court considered the intervening decision of Enmund v. Florida, 458 U.S. 782 (1982), in a post-conviction context, the court expressed some confusion whether the issue had been raised or could have been answered in the opinion on direct review. However that post-conviction petition was Edwards' first post-conviction pleading and the issue had not been resolved by a federal court of appeals as in this case. The decision in Enmund was a clear departure from the precedent as it had existed at the time.

Reliance on Culberson v. State, 412 So.2d 1184 (Miss. 1982), is likewise misplaced. The question considered by the court below in Culberson was one concerning ineffective assistance of counsel. The court below has never applied the procedural

bar rule to the issue of ineffective assistance of counsel until there has been a meaningful opportunity to raise such a claim. As stated in Read v. State, 430 So.2d 832 (Miss. 1983):

This Court has never heretofore applied the procedural bar rule where a convicted defendant has on direct appeal urged ineffective assistance of counsel. This is true even though this Court has been considering the ineffective assistance of counsel issue for years, apparently without anyone suggesting that the point had to be procedurally preserved in the trial court. [citations omitted.] In most of these cases the claim of ineffective assistance of counsel was rejected on its merits. But because the issue in each case was treated on the merits, although occasionally cursorily, these cases necessarily stand for the proposition that no procedural bar rule has heretofore been applied.

In addition to the direct appeal cases cited above, we note that right to counsel claims have also been asserted via proper post-conviction proceedings, even though the point was not

preserved at trial and not raised on direct appeal. See Nelson v. Tullos, 323 So.2d 539, 543 (Miss. 1975); Berry v. State, 345 So.2d 613 (Miss. 1977).

430 So.2d at 838.

Abiding by its long standing policy of treating ineffective assistance of counsel claims made on direct appeal and in a first post-conviction proceeding differently than other claims when applying the procedural bars the court below considered the claim of ineffective assistance of counsel that could not be determined from the record on direct appeal and granted Culberson an evidentiary hearing on the issue of whether he had been denied the right to testify in his own behalf. After a hearing in the trial court on this matter relief was denied again and that denial was affirmed. Culberson v. State, 456 So.2d 697 (Miss. 1984).

Culberson was granted no relief only an evidentiary hearing. The case at bar is different in that the petition raising the issue is a successive post-conviction petition attempting to relitigate a matter by raising an issue that has been previously decided. On successive petitions the court below has held even the issue of ineffective assistance of counsel to be barred. Johnson v. State, 508 So.2d 1126, 1128-1129 (Miss. 1987); Evans v. State, 485 So.2d 276, 280-281 (Miss. 1986), cert. den. \_\_\_ U.S. \_\_\_, 90 L.Ed.2d (1986).

CONCLUSION

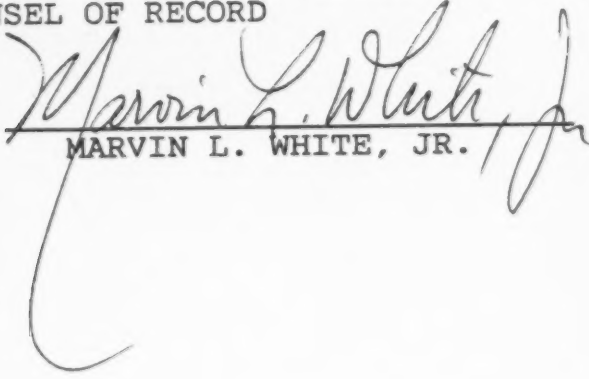
For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

MIKE MOORE  
ATTORNEY GENERAL  
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.  
ASSISTANT ATTORNEY GENERAL  
COUNSEL OF RECORD

BY:

  
MARVIN L. WHITE, JR.



CERTIFICATE OF SERVICE

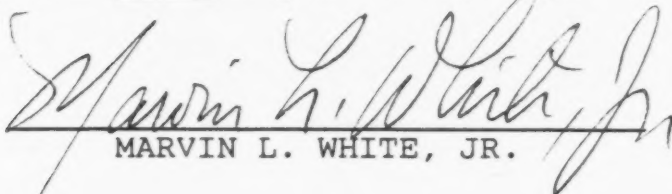
I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Opposition to each of the following:

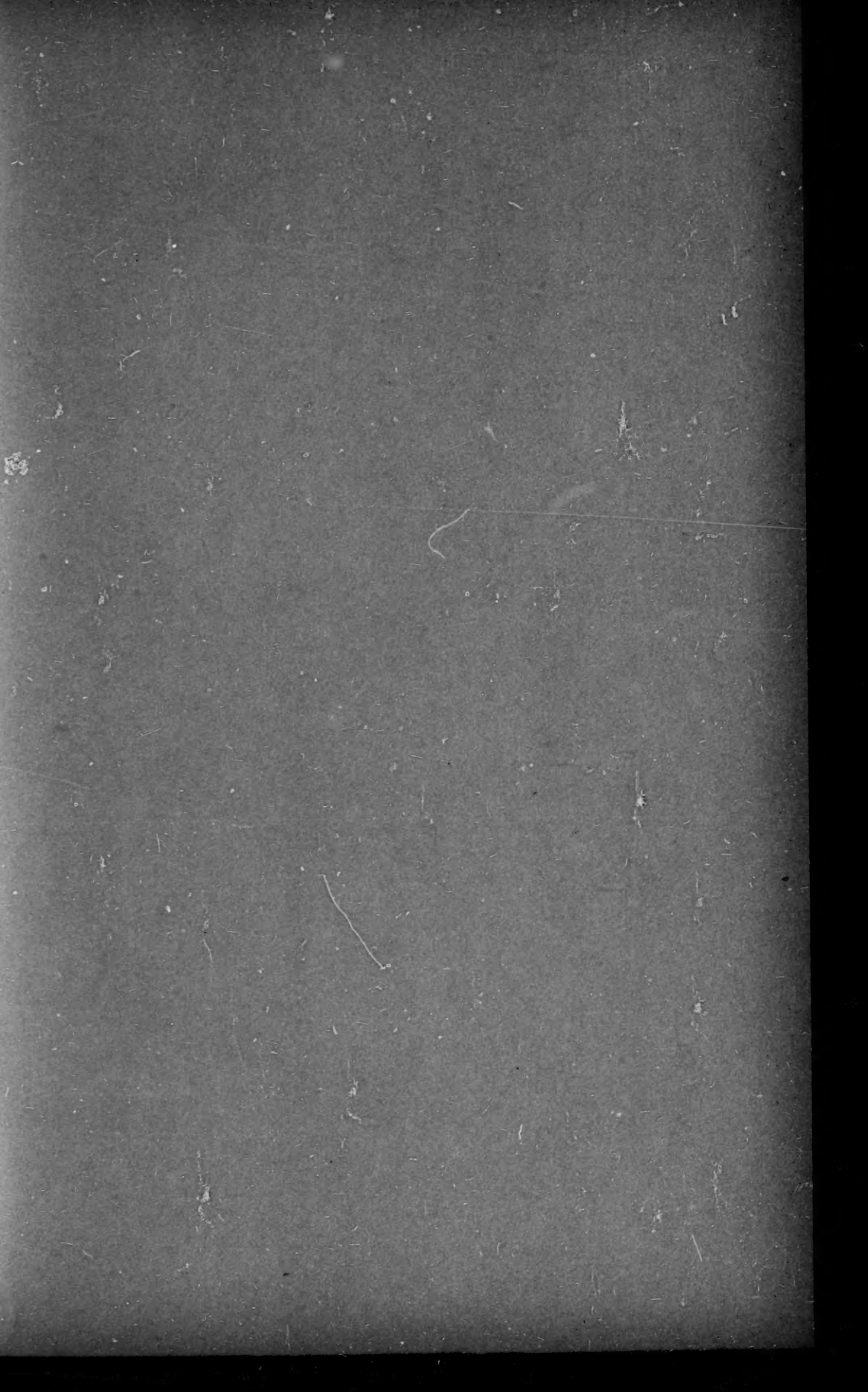
Timothy N. Black, Esquire  
Wilmer, Cutler & Pickering  
1666 K Street, N.W.  
Washington, D.C. 20006

Joseph P. Hudson, Esquire  
Lawyer and Hudson  
Post Office Box 908  
Gulfport, MS 39501

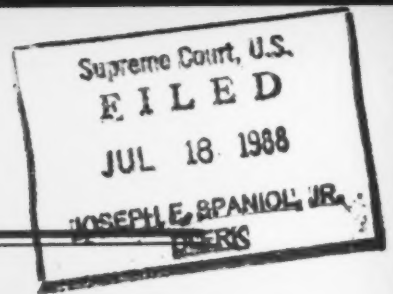
Earl B. Stegall, Esquire  
Post Office Box 1542  
Gulfport, MS 39501

This, the 24<sup>th</sup> day of June, 1988.

  
MARVIN L. WHITE, JR.



3  
No. 87-1797



IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1988

RICHARD GERALD JORDAN,  
*Petitioner,*

v.

STATE OF MISSISSIPPI,  
*Respondent.*

On Petition for a Writ of Certiorari  
to the Supreme Court of Mississippi

REPLY BRIEF FOR PETITIONER

JOSEPH P. HUDSON  
LAWYER AND HUDSON  
Post Office Box 908  
Gulfport, MS 39501

EARL B. STEGALL  
Post Office Box 1542  
Gulfport, MS 39501

July 18, 1988

TIMOTHY N. BLACK \*  
PHILIP D. ANKER  
MAXWELL O. CHIBUNDU  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000  
Counsel for Petitioner

\* Counsel of Record



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**On Petition for a Writ of Certiorari  
to the Supreme Court of Mississippi**

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**REPLY BRIEF FOR PETITIONER**

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Richard Gerald Jordan submits this reply to the arguments presented by the State of Mississippi in its brief in opposition to Mr. Jordan's petition for a writ of certiorari to the Supreme Court of Mississippi.

**I. The State's Opposition, Which Suggests That State Courts in Mississippi Can Disregard This Court's Decision in *Yates v. Aiken*, Underscores the Importance of This Case and the Need for Certiorari.**

The State argues that the Supreme Court of Mississippi appropriately declined to address the merits of Mr. Jordan's application for post-conviction relief on the basis of state law principles of *res judicata*. The State makes no attempt to reconcile the state court's refusal to consider the effect of this Court's intervening decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), with this

Court's unanimous holding in *Yates v. Aiken*, 108 S. Ct. 534 (1988), that state courts in collateral proceedings must give effect to intervening decisions of this Court that apply established principles of federal constitutional law.<sup>1</sup> The State does not dispute that if the decision below is allowed to stand, *Yates* will in effect be rendered a nullity in Mississippi: under the practice now prevailing in the state, if a defendant fails to raise a federal constitutional claim on direct appeal, he will typically be held to have waived the claim; if he raises the claim on direct appeal, he will be barred on *res judicata* grounds from relitigating the issue in a state post-conviction proceeding even if there has been an intervening decision by this Court and even if that intervening decision must be applied retroactively under *Yates*. See Pet. 15-17 & nn. 27, 28.

Indeed, the State appears to argue that the Supreme Court of Mississippi can simply ignore *Yates* because that court has placed limits on the issues it will consider in state collateral proceedings. See Opp. 34. Those supposed limits—the sole factor cited by the State as distinguishing this case from *Yates*—provide no basis for ignoring the *Yates* holding here. As we noted in the

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<sup>1</sup> Although the State appears to argue that *Michigan v. Jackson* should not be applied retroactively in a post-conviction proceeding (an argument not relied on by the court below), it continues to assert (Opp. 29) that *Michigan v. Jackson* “is not new law.” Under *Yates v. Aiken*, such an intervening decision must be applied retroactively in collateral proceedings. Given the State’s reading of *Michigan v. Jackson*, it is difficult to comprehend its reliance (Opp. 33) on *Allen v. Hardy*, 478 U.S. 255 (1986). In holding in *Allen* that *Batson v. Kentucky*, 476 U.S. 79 (1986), does not apply retroactively in collateral proceedings, this Court emphasized that *Batson* represented “an explicit and substantial break with prior precedent.” *Allen v. Hardy*, 478 U.S. at 258. The State’s reliance (Opp. 31-33) on *Griffith v. Kentucky*, 107 S. Ct. 708 (1987), is similarly misplaced because, as the State recognizes, *Griffith* concerns the standards for retroactivity with respect to cases pending on direct appeal, not collateral proceedings.



petition for certiorari, and as further illustrated below, the Supreme Court of Mississippi in post-conviction proceedings has reconsidered federal constitutional issues that were addressed on direct appeal in cases, such as this one, in which there has been an intervening decision. Indeed, the Mississippi Collateral Relief Act expressly directs the state courts to entertain successive state collateral petitions where—as here—there has been a controlling “intervening decision of the supreme court of either the state of Mississippi or the United States.” Miss. Code Ann. §§ 99-39-23(6), 99-39-27(9) (Cum. Supp. 1987).

The State’s efforts to distinguish other post-conviction cases in which, because of the existence of intervening decisions, the Supreme Court of Mississippi has disregarded *res judicata* principles and addressed the merits of federal constitutional claims that had been considered on direct appeal are unconvincing. The State notes that the defendant in *Edwards v. Thigpen*, 433 So. 2d 906 (Miss. 1983), had not previously sought post-conviction relief and argues that the intervening decision, *Enmund v. Florida*, 458 U.S. 782 (1982), on the basis of which the Supreme Court of Mississippi in *Edwards* reexamined its earlier decision, amounted to a “clear departure” from prior precedent.<sup>2</sup> The State, however, does not claim that there is any “substantial state interest,” *Henry v. Mississippi*, 379 U.S. 443, 449 (1965), that would justify its courts in refusing (despite the existence of an intervening decision) to reconsider issues that had been addressed on direct appeal and in federal ha-

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<sup>2</sup> Opp. 35. The State is simply wrong in asserting that the Supreme Court of Mississippi in *Edwards* “expressed some confusion” as to whether the issue had been raised and addressed on direct appeal. *Id.* In its opinion in the post-conviction proceeding, the Supreme Court of Mississippi specifically noted that the defendant “admits having raised the point at trial and on motion for a new trial, and on direct appeal here wherein we affirmed.” *Edwards v. Thigpen*, 433 So. 2d at 908.

beas corpus proceedings, while permitting reconsideration of the same issue based on the same intervening decision so long as the claim had been addressed only on direct appeal. And even if *Enmund* represented "new law," that factor would not support the state court's willingness to reach the merits of the federal constitutional claim in *Edwards* and the refusal to do so here. *Yates v. Aiken* requires the retroactive application in state collateral proceedings of interpreting decisions that do not represent a break with prior precedent.

Similarly, the distinctions that the State draws between Mr. Jordan's case and *Culberson v. State*, 412 So. 2d 1184 (Miss. 1982), are unavailing. Noting that the issue that was reconsidered in *Culberson* involved a claim of ineffective assistance of counsel, the State argues that the Supreme Court of Mississippi has often procedurally treated claims of ineffective assistance of counsel differently than it treats other claims.<sup>3</sup> To be sure, the Supreme Court of Mississippi has not applied a contemporaneous objection rule to ineffectiveness claims, recognizing that defendants cannot be expected to object at trial to the competency of the lawyers then representing them. See *Read v. State*, 430 So. 2d 832, 838-39 (Miss. 1983). But that has nothing to do with the state court's application of *res judicata* principles.<sup>4</sup> In *Culberson*, on

<sup>3</sup> Opp. 35-38. The State also cites two cases, *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), and *Evans v. State*, 485 So.2d 276 (Miss.), cert. denied, 476 U.S. 1178 (1986), in which the Supreme Court of Mississippi has refused in a successive post-conviction proceeding to address an ineffectiveness claim that the defendant failed to raise the first time he had an opportunity to do so—in the first post-conviction proceeding. Those cases are inapposite. As noted below (see *infra* p. 6), Mr. Jordan challenged the admission of the tape-recorded statements when he first had an opportunity to do so (in the direct review proceedings), and the Supreme Court of Mississippi below did not rely on any purported waiver.

<sup>4</sup> The State is mistaken in suggesting that the Supreme Court of Mississippi will not apply *res judicata* principles to ineffective-

direct appeal, the Supreme Court of Mississippi rejected the argument that defense counsel had not permitted the defendant to testify, reasoning that a defendant who retains his own counsel waives the right forever to challenge the lawyer's actions. In the subsequent post-conviction proceeding, the Supreme Court of Mississippi reconsidered the issue on the basis of this Court's intervening decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), eschewing *res judicata* notions; the state court concluded that the defendant could raise the ineffectiveness claim it previously had held to have been waived. *Culberson v. State*, 412 So. 2d at 1185-86. That is precisely what the Supreme Court of Mississippi has refused to do here—reexamine Mr. Jordan's Sixth Amendment claim in light of this Court's intervening decision in *Michigan v. Jackson*.

This Court this term—in a case also from Mississippi—has again underscored that state courts in state post-conviction proceedings cannot refuse to reach the merits of federal claims, and preclude federal courts from reaching the merits of those claims, on the basis of state procedural bars that the state courts have not “consistently and regularly applied.” *Johnson v. Mississippi*, 56 U.S.L.W. 4561, 4564 (U.S. June 13, 1988). That principle applies fully here.

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ness claims raised in a defendant's first post-conviction proceeding where no intervening decision has been issued since the direct appeal. The Supreme Court of Mississippi in *Read* stated that, when the parties stipulate that the record on direct appeal is adequate to address the issue, a claim of ineffectiveness can be resolved on direct appeal. 430 So. 2d at 841-42. In a subsequent post-conviction case in which the defendant so stipulated, the Supreme Court of Mississippi refused to address the merits of the ineffectiveness claim, holding that its decision on direct appeal barred further consideration of the claim. *Smith v. State*, 434 So. 2d 212, 219-20 (Miss. 1983).

## II. The State's "Waiver" Arguments Were Not Relied on by the Court Below and Have No Merit.

The State argues that Mr. Jordan waived his Sixth Amendment claim by supposedly failing to press the claim at various stages of the litigation. The simple answer to the State's contention is that in denying Mr. Jordan's application for post-conviction relief, the Supreme Court of Mississippi did not rely on any state rule of waiver or procedural default. Rather, the judgment below rested exclusively on *res judicata* grounds.<sup>5</sup> This Court has emphasized that "[t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). See also *Ulster County Court v. Allen*, 442 U.S. 140 (1979). The State's waiver argument therefore, even if it had any basis in law, would not be a bar to the grant of certiorari.

In any event, the waiver contention is baseless. The State does not dispute that Mr. Jordan challenged the admission of the tape-recorded statements—taken from him outside the presence of his attorneys after he requested the assistance of counsel—at trial, on direct appeal to the Supreme Court of Mississippi, and in a petition to this Court for certiorari following the direct appeal.<sup>6</sup> And the State also does not deny that, ever since

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<sup>5</sup> This is evident from the Supreme Court of Mississippi's own statement of its holding: "We hold that the question is *res judicata* and is barred from relitigation." *Jordan v. State*, 518 So. 2d 1186, 1189 (Miss. 1987); App. 8a. Nowhere in the opinion does the Supreme Court of Mississippi discuss, let alone purport to base its decision on, any claim of waiver.

<sup>6</sup> For this reason, the State's reliance on *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987), and *Johnson v. State*, 508 So. 2d 1126 (Miss. 1987), is misplaced. Unlike Mr. Jordan, the defendant in those cases failed to raise his federal constitutional claim on direct

this Court issued its 1986 decision in *Michigan v. Jackson*, Mr. Jordan has vigorously reasserted his federal claim.

Nevertheless, the State contends (Opp. 24-25) that Mr. Jordan waived his Sixth Amendment argument when he did not raise it in a state post-conviction proceeding filed in 1980. There is no requirement in Mississippi law that defendants in criminal cases must reassert in collateral proceedings claims that were presented to the Supreme Court of Mississippi on direct appeal and rejected. To the contrary, the Supreme Court of Mississippi has held on many occasions that claims resolved on direct appeal may not be relitigated in a state collateral proceeding—absent an intervening controlling decision of law, such as *Michigan v. Jackson* here.<sup>7</sup> Indeed, the entire purpose of the 1980 post-conviction proceeding was to give the state courts an opportunity to consider certain claims that had not been addressed on direct appeal. As the State itself acknowledges (Opp. 4, 15-16), Mr. Jordan initiated the 1980 state post-conviction proceeding after the State successfully moved to dismiss a federal habeas corpus petition—which raised the Sixth Amendment claim—filed by Mr. Jordan because Mr. Jordan had not previously presented to the state courts some of the

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appeal or in his initial federal habeas corpus petition; because of that failure, the courts held that the defendant was barred from raising the issue for the first time in subsequent collateral proceedings. *Johnson v. Cabana*, 818 F.2d at 344; *Johnson v. State*, 508 So. 2d at 1127. For the same reason, *Engle v. Issac*, 456 U.S. 107 (1982), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Smith v. Murray*, 477 U.S. 527 (1986), cited by the State (Opp. 28-29), are inapposite. In each of those cases, the defendants failed to assert the claim at issue either at trial or on direct appeal, and the state courts therefore refused to address the issue, relying on the procedural default doctrine.

<sup>7</sup> See, e.g., *Stringer v. State*, 485 So. 2d 274, 275 (Miss.), cert. denied, 107 S. Ct. 327 (1986); *Callahan v. State*, 426 So. 2d 801, 803 (Miss.), cert. denied, 461 U.S. 943 (1983).



other issues raised in the federal petition. In moving to dismiss the federal petition, the State did not, and could not, argue that Mr. Jordan had failed to present to the state courts his federal constitutional challenge to the admission of the tape-recorded statements and Mr. Jordan accordingly did not reassert that claim in the 1980 state post-conviction proceeding.<sup>8</sup>

The State next contends (Opp. 17, 27) that Mr. Jordan abandoned his Sixth Amendment claim when he failed to seek certiorari from the 1982 decision of the United States Court of Appeals for the Fifth Circuit that denied him habeas corpus relief with respect to his conviction but granted relief with respect to his sentence. As noted, Mr. Jordan had previously filed a petition for certiorari with this Court (from the 1978 judgment of the Supreme Court of Mississippi on direct appeal) raising the same Sixth Amendment issue. In any event, the State cites no precedent for the proposition that a failure to seek certiorari from a judgment in a criminal case constitutes a waiver of all claims, precluding the defendant from bringing a subsequent collateral proceeding. This Court's decisions suggest just the opposite—particularly when the issue has been presented in a prior petition for certiorari and there has been an intervening dispositive case.<sup>9</sup>

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<sup>8</sup> Cf. *Roberts v. LaVallee*, 389 U.S. 40, 42-43 (1967) (defendant who had raised his federal claim in state courts on direct appeal from conviction did not also need to commence collateral proceedings in state courts in order to exhaust state remedies with respect to that claim).

<sup>9</sup> In *Fay v. Noia*, 372 U.S. 391, 435-36 (1963), this Court held that a defendant's failure to seek certiorari from a state court judgment affirming his conviction would not be a bar to the defendant's seeking federal habeas relief. If the State's waiver argument were accepted here, then defendants in Mr. Jordan's situation would have every incentive, at all stages of a case in which a petition for certiorari could be submitted, to file for certiorari and raise every conceivable federal claim they might have out of concern that if they did not do so they would be held to have waived all such

Finally, the State argues (Opp. 29) that Mr. Jordan waived his Sixth Amendment claim by not presenting it as one of the grounds for certiorari in his 1985 petition to this Court from the judgment of the Supreme Court of Mississippi affirming his now-vacated death sentence. That petition for certiorari concerned the 1983 sentencing proceeding, not the 1977 trial that resulted in Mr. Jordan's conviction. Even if a failure to seek certiorari could under some circumstances constitute a waiver of a federal claim in a criminal case, Petitioner could not have raised a challenge in his 1985 petition for certiorari to the admission of the tape-recorded statements at his 1977 trial. *See* Pet. 8 n.12.

Respectfully submitted,

JOSEPH P. HUDSON  
LAWYER AND HUDSON  
Post Office Box 908  
Gulfport, MS 39501

EARL B. STEGALL  
Post Office Box 1542  
Gulfport, MS 39501

TIMOTHY N. BLACK \*  
PHILIP D. ANKER  
MAXWELL O. CHIBUNDU  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037  
(202) 663-6000

Counsel for Petitioner

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\* Counsel of Record

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claims. The recognition that such a situation would "unwarrantably tax[] the resources of this Court" and "be an unnecessar[y] burden[]" . . . in the orderly processing of the federal claims of those convicted of state crimes" led in part to this Court's holding in *Fay*. 372 U.S. at 437. *Cf. Davis v. United States*, 417 U.S. 333, 342 (1974) (holding that a federal habeas corpus petitioner was entitled to have his previously-rejected federal claim reconsidered because there had been an intervening relevant decision).